82-518

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No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ORA ACKERMAN, as Superintendent;
FORT WAYNE STATE HOSPITAL AND TRAINING CENTER, an Instrumentality of the State of Indiana
Petitioners,

v.

HAROLD DELESSTINE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's standard for establishing wrongful discharge under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) and 42 U.S.C. §2000 *et seq.* is met and the burden properly shifted to defendant employer when the discharged minority member is replaced by another minority member.

2. Whether the *McDonnell Douglas* test can be utilized to establish illegal racial animus when the public entity employer has enunciated a clear non-discriminatory reason for the discharge and provided unrefuted evidence of the statistical make-up of the work force which totally rebutes a finding of racial animus.[1]

LIST OF PARTIES

The caption of this case contains all the parties within the meaning of Rule 21.1(b) of the Rules of this Court.

[1]Respondent did not attempt to show either disparate impact or disparate treatment which would preclude Petitioners' neutral statistics under *Connecticut v. Teal*, ___ U.S. ___, 102 S.Ct. 2525 (1982). Petitioners contend that *Teal* does not prevent an employer's use of statistics combined with a nondiscriminatory reason as a valid defense in a Title VII action.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, hereafter Seventh Circuit, was issued June 24, 1982. It is reported at 682 F.2d 130 and a copy is attached to this Petition at A-1. The unreported district Court decision is attached at A-16.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Rule 17.1(b) and (c) of the Rules of this Court to review a decision of the Seventh Circuit which is in conflict with applicable decisions of this Court regarding material elements of the *McDonnell Douglas* test; the weight to be attached to the statistical make-up of the employer's workforce; and a decision of the Fifth Circuit regarding possible mistaken belief of the employer as a defense.

This Petition is timely filed within the ninety (90) day period established by 28 U.S.C. §2101(c) and Rule 20.4 of the Rules of this Court.

STATUTORY PROVISIONS INVOLVED

This case arose as a standard civil rights action under 42 U.S.C. §2000e *et seq.*, A-27. It, and the interpretive decisions of it by this Court, are the only provisions involved in this Petition.

STATEMENT OF THE CASE

This action commenced with the filing of Respondent's Complaint on July 25, 1978. After appropriate pretrial matters were disposed of, the case went to bench trial on June 7 and July 7, 1980. This review commenced with entry of judgment by the District Court on July 23, 1980 awarding Respondent back pay. A divided Seventh Circuit affirmed the District Court on June 24, 1982.

FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

A number of facts established in this action are essentially undisputed. Respondent DeLesstine, a black male, was employed at Fort Wayne State Hospital as a dietician, a position with supervisory authority. Petitioner, Dr. Ora Ackerman, was and is the Superintendent of that institution. Respondent was on leave with pay for a portion of 1974 due to hemorrhoid surgery. Leave began April 16, 1974. Prior to July 16, 1974, Respondent received a number of statements from his attending physician extending his return to work date. All of these were presented to the employer and none indicated any limited release to work anywhere.

During the extended leave, Respondent worked May 28, May 31, June 26, June 27 and July 11, 1974, at Glen Oaks Nursing Home in Auburn, Indiana, all days and hours he would have worked at Fort Wayne State Hospital. There was no written communication from either Respondent or Respondent's physician to Fort Wayne State Hospital indicating this outside employment was permitted. Respondent acknowledged in testimony that no one at Fort Wayne knew that he had even commenced such outside employment. Respondent also admitted he knew of no individual during his eleven (11) year tenure with Fort Wayne State Hospital who accepted sick pay benefits from the institution while working elsewhere and was not disciplined.

Petitioner Ackerman, Superintendent of Fort Wayne State Hospital, discovered Respondent's outside employment by report from an employee, and, after reviewing the continued excuses referred to above, discharged Respondent. Respondent was suspended July 16, 1974, pending dismissal thirty (30) days later.

Petitioner Ackerman, Superintendent of Fort Wayne Hospital since June 1, 1966, has disciplined a number of

employees, both black and white, who have drawn sick pay from the state institution while working elsewhere. Five (5) or six (6) individuals were dismissed for such a practice in the past, both white and black.

Undisputed testimony established that there are currently about 1,200 persons employed at Fort Wayne State Hospital and, in 1974, that number was between 1,300 and 1,400. There are approximately two (2) black individuals in supervisory roles to every (1) white in a similar position at the institution.

Dr. Edward Sirlin, medical director at Fort Wayne State Hospital during 1974, telephoned Respondent's physician on or about July 11, 1974 concerning Respondent. No mention of any limited release to work was made by Respondent's physician. After Respondent's suspension pending dismissal on July 16, 1974, Dr. Sirlin again called Respondent's physician. Dr. Sirlin recalls a negative response from Respondent's physician concerning permission to work, a position which Dr. Sirlin indicated to Petitioner Ackerman by written report. Respondent's physician recalled one (1) phone conversation, apparently the conversation prior to July 16, 1974, but was uncertain of any others.

Respondent's position at the institution was temporarily filled by a white male. His position was permanently filled by a Ms. Effie Goodwin Lee, a white female, after a national search by the institution.

Respondent produced no evidence to rebut the statistical racial analysis of the work force, establish disparity of treatment, or show nonexistence of the policy of discharging employees who work for other employers while accepting sick pay benefits from the institution.

REASONS FOR ALLOWANCE OF THE WRIT

I.

The Opinion of the Seventh Circuit Either Ignores the Standard *McDonnell Douglas* Test or Engrafts Upon it a Requirement Not Called for by Decisions of this Court

This Court in *McDonnell Douglas v. Green*, 411 U.S. 792, (1973) adopted a four part test to assist plaintiffs in establishing a *prima facia* case in a Title VII action.[2] Once the *prima facia* case is established the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the action, *McDonnell Douglas*, *supra* at 803-804.

It is Petitioners' contention that element (IV) of the test in a discharge setting requires that the plaintiff establish that after his discharge his position was filled by a member of a non-protected minority. The result is clearly the only means of preserving the logic and intent of the original *McDonnell Douglas* test.

It is undisputed that Respondent was replaced by a white female of similar qualifications. Clearly females are afforded protected status by federal law, 42 U.S.C. §2000e *et seq.*. Respondent, therefore, did not establish a *prima facia* case within the meaning of *McDonnell Douglas*.

Judge Cummings, writing for majority in the Seventh Circuit, concluded that the applicable language in element (IV) of the *McDonnell Douglas* test referred solely to the similarity between the replacement's and Respondent's

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[2] "This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas*, *supra* at 802.

qualifications and not the replacement's status as a protected minority, 682 F.2d at 133.[3]

Petitioners submit that the Seventh Circuit has corrupted the *McDonnell Douglas* standard by either ignoring the clear import of this Court's original decision or by engrafting upon it a provision uncalled for by this Court. The entire theory of the *McDonnell Douglas* standard is to assist potential plaintiffs in establishing their case in an area often difficult to prove. Ignoring Petitioners' employment of a protected minority does *not* demonstrate the animus that the *McDonnell Douglas* test permits a court to infer. Indeed, affirmatively hiring protected minorities strongly indicates that an employer's action toward a single employee was motivated by something *other* than the proscribed animus.

II.

Petitioners Properly Articulated a Non-Discriminatory Reason for Respondent's Discharge and Presented a Defense Based Upon a Numerical Analysis of the Workforce Which Was Ignored by the Seventh Circuit

Respondent was dismissed for conduct unbecoming a state employee; specifically, Respondent was working elsewhere while accepting sick pay benefits from the State. Petitioner Ackerman had disciplined other employees, both black and white, during his tenure as Superintendent for the same reason.

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[3]This result was made apparent by the Court in a footnote.

"... As will be clear from our analysis, we disagree with the language of the *Markey* [*v. Tenneco Oil Co.*, 439 F.Supp. 219, 223 (D.C. La. 1977), *aff'd* in part and *rev'd* in part, 635 F.2d 497 (5th Cir. 1981)] court that appears to require for proof of a prima facia case of a Title VII discrimination that the person discharged be replaced by a "non-minority." 682 F.2d at 132 n. 1.

The Seventh Circuit concluded that the reason given was pretext masking racial animus.[4] Presumably, this result was reached on the basis of a conflict between the testimony of Respondent's physician and Petitioner's employee, Dr. Sirlin, regarding the number and content of telephone conversations occurring *after* the suspension pending termination was entered.

Undisputed evidence established that at the time Petitioner Ackerman decided to discharge Respondent, he, Petitioner Ackerman, had before him only a series of notes from Respondent's physician extending Respondent's return to work date and containing no limited release to work or approval to work, and direct confirmation that Respondent was working elsewhere. On this evidence and over the adamant dissent of Judge Pell, the Seventh Circuit concluded that the Petitioner's articulated reason was pure pretext masking racial animus.

Assuming, arguendo, that Petitioner Ackerman was mistaken regarding the release to work, Petitioners submit that mistake as to facts, if honestly held, does not show illegal intent or establish that the reason was pretext under the rule adopted in the Fifth Circuit, *Turner v. Texas Instruments*, 555 F.2d at 1256-1257 (5th Cir. 1977).

Or assuming, arguendo, that Petitioner Ackerman disliked or bore ill will toward Respondent, it is clearly impossible to conclude that the ill will was based upon racial animus made illegal under Title VII when the undisputed evidence makes apparent that of the some 1,200 employees under Petitioner Ackerman's charge there are twice as many black supervisory staff as white.

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[4] "In summary, the appellant's articulated reason of 'conduct unbecoming a state employee' was a conclusory reason which might have been a legitimate reason for discharging the appellee if he had not been able to prove employer's intentional discrimination by showing that the articulated reason was mere pretext." *682 F.2d 136.*

Racial animus, by its very nature, would logically be exhibited by the employer toward all employees of that race. Where, as here, evidence shows a highly favorable workforce composition, that evidence would strongly indicate lack of racial motivation in the individual case. The entire purpose of the *McDonnell Douglas* test and the disparate impact theory of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) is to *infer* racial animus where it likely exists;[5] not to impose liability where none is present.

By corrupting the *McDonnell Douglas* test and finding the stated reason as pretext, the Seventh Circuit has concluded that a superintendent of fourteen (14) years experience at the state institution harbored *racial* animus, not toward all black supervisors, but toward Respondent solely, and secreted away that racial animus some eight (8) years before he gave vent to bigotry and discharged Respondent. This result is clearly absurd.

As Judge Pell properly noted:

> I fail to follow the logic of the majority opinion in its holding that the discharge was pretextual. The record is silent as to any discriminatory practices on the part of the appellants toward any employees because of race, color, religion, sex, or national origin. The finding of pretext dangles on the weak thread of the

[5] "A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are most likely than not based on the consideration of impermissible factors. (citations omitted) And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, whom we generally assume acts only with some reason, based his decision on an impermissible consideration such as race." *Furnco Const. Corp. v. Waters*, 439 U.S. 562, (1978).

plaintiff's not being well enough to return to his state job and contradictory testimony as to what one doctor said to another. Apparently, the majority makes the credibility determination as to the accurate reflection of this conversation. Elsewhere, however, in the majority opinion it is clear that the memorandum from Dr. Sirlin to Dr. Ackerman was subsequent to the determination already made, and properly so, that the discharge was justified by conduct unbecoming to a state employee. I see nothing conclusory or pretextual about guarding the public coffers from unwarranted criticism.

In short, the majority's syllogism seems to be that plaintiff was a member of a protected minority class, that he was a competent employee with acceptable qualifications, that he was discharged because he was working on another job while on sick leave, *ergo*, the reason given for his discharge was pretextual. The process ignores the fact that there was a legitimate non-discriminatory reason for the discharge. What Title VII is all about is to put a stop to discriminatory treatment of employees. The essential element of discrimination is missing here. 682 F.2d at 137-138.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the decision of the Seventh Circuit.

Respectfully submitted,

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IN THE

United States Court of Appeals

For the Seventh Circuit

No. 80-2102

HAROLD DELESSTINE,

Plaintiff-Appellee,

v.

FORT WAYNE STATE HOSPITAL AND TRAINING CENTER, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division. No. CF-78-93—*Jesse E. Eschbach*, Judge.

Before CUMMINGS, Chief Judge, PELL, Circuit Judge, and CUDAHY, Circuit Judge.

CUMMINGS, Chief Judge. This is a review of the district court's finding that defendants-appellants have unlawfully terminated plaintiff's employment as a Dietician III at the Fort Wayne State Hospital and Training Center (State Hospital), because of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*

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*After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Rule 34(a); Fed. R. App. P., Circuit Rule 14(f). Appellants have filed such a statement and requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

We proceed by addressing appellants' argument which is tantamount to an assertion of an affirmative defense, namely that in order to establish an element of a prima facie case of employment discrimination, the plaintiff is required to prove that his position was not filled by "a member of the protected minority."

In *McDonnell Douglas Corp. v. Green*, the Supreme Court held that a plaintiff could make a prima facie claim of employment discrimination by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. 792, 802 (1973) (footnote omitted). Appellants argue that appellee has not and cannot establish a prima facie case of discriminatory discharge from employment because "element (iv) [of the *McDonnell* model for proving a prima facie case] necessitates a showing that a plaintiff's position was filled by a person not a member of the protected minority.... [And since] the evidence established that [appellee, a black man] was permanently replaced by a member of a protected class [a female], the burden of going forward did not pass to Appellants."[1]

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[1] Appellant cites *Markey v. Tenneco Oil Co.*, 429 F.Supp. 219, 223 (D.C. La., 1977) *aff'd* in part and *rev'd* in part, 635 F.2d 497 (5th Cir. 1981). However, it appears that appellant is relying on the holding at 224 where the court stated: "It is questionable in this case whether Markey has even gone so far as to present a prima facie case of discrimination. A plaintiff's mere suspicion that he has been discriminated against, is not sufficient evidence to support an individual charge under Title VII. *Markey did not demonstrate that the position he vacated was filled by a white person. In fact, Paul Floth testified that Markey had been replaced by a black.*" (footnote omitted) (emphasis added)

[Appellants' *Brief* at 6-7]. The dissenting opinion, in support of appellants' argument, also sees the fact that appellants sought minority applicants as foreclosing the finding that appellants have engaged in discriminatory conduct towards this appellee.[2]

That reasoning would foreclose a plaintiff from proving a prima facie case unless an employer discriminated not only against plaintiff but also against every so-called protected minority by hiring a so-called "non-protected" person to fill the position.[3] Appellants' argument defies the logic, purpose and language of Title VII.

The reference to an employer seeking applicants from persons of "complainant's qualifications" in the (iv) element of the *McDonnell* model for establishment of a prima facie case, does not refer to the complainant's racial, ethnic, gender, religious, or national origin background. Title VII

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[2]"The ultimate fact is that State authorities are branded as having engaged in discriminatory conduct in violation of a federal statute, notwithstanding, as the majority opinion observed, 'the appellants did in fact seek minority applicants.'" *Infra* at 14 (Pell, J., *dissenting*).

[3]Establishment of a prima facie case under the *McDonnell* model "creates a presumption [a legally mandatory inference] that the employer unlawfully discriminated against the employee". *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-255 (1981). It does not constitute an ultimate finding of fact as to discriminatory discharge from employment under Title VII. *Furno Const. Corp. v. Waters*, 438 U.S. 576 (1981). "The ultimate burden of persuading the trier of fact that the defendant unintentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 253. After a plaintiff proves, by a preponderance of the evidence, a prima facie case of discriminatory discharge or failure to hire, the burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employer's rejection [or employee's discharge]." *McDonnell Douglas Corp v. Green*, 411 U.S. at 802. If such reason is articulated by the employer, the focus returns to the plaintiff so that he can be afforded a fair opportunity to show that [the employer's] stated reason for [the employee's] rejection [or discharge] was in fact pretext." *Id.* at 804; *Davis v. Weidner*, 596 F.2d 726, 729 (7th Cir. 1979).

does not establish a class of protected minorities and non-protected others. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 259. "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." *Furnco Const. Corp. v. Waters*, 438 U.S. at 579. We hold that the reference to "complainant's qualifications" in the *McDonnell* model refers to a complainant's pertinent skills, talents, learning, training, and experience. The central focus of the inquiry in a Title VII case such as this is whether the employer is treating a plaintiff less favorably than others because of his race, color, religion, sex or national origin. *Id.* at 577. "[T]he Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has prescribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.... Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.... Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origin. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant." *Griggs v. Duke Power Co.*, 401 U.S. 424, 430, 431, 432, 436 (1971).

The fact that appellants have hired a female to replace appellee does not therefore preclude appellee from proving a prima facie case of discriminatory discharge from

employment. "A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.... 'The company's later changes in its hiring and promotion policies could be of little comfort to the victims of the earlier post-Act discrimination, and could not erase its previous illegal conduct or its obligation to afford relief to those who suffered because of it.'" *Furnco Const. Corp. v. Waters*, 438 U.S. at 579, *citing, Teamsters v. United States*, 431 U.S. 324, 341-342 (1977).[4]

II

We will now apply the clearly erroneous standard to the review of the district court's findings of subsidiary facts encompassing the parties' conduct. *Fed. R. Civ. P. 52(a).* However, the ultimate fact of discrimination, namely whether defendants' conduct constitutes a violation of Title VII, involves both a finding of fact and a conclusion of law. Consequently, we may make an independent examination of the ultimate fact of discrimination, though we are still bound by findings of subsidiary facts which are not clearly erroneous. *Stewart v. General Motors Corp.*, 542 F.2d 445, 449 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977).

Plaintiff-appellee established a prima facie case of employment discrimination by proving that: he is a black man who was qualified for his position as chief dietician at the State Hospital having been trained in dietetics, receiving a bachelor of science degree from New York

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[4]Even assuming *arguendo* that appellants' interpretation of the (iv) element in *McDonnell* was correct, their argument is nonsensical. The facts in the instant case clearly show that appellants did in fact seek "minority" applicants. Therefore even if as appellants contend, "complainant's qualifications" in *McDonnell* refers to a complainant's "minority" status, which, as we made clear, it does not, plaintiff has satisfied the requirement of showing that the employer sought applicants of complainant's qualification.

University;[5] despite his satisfactory work performance he was discharged from his position;[6] and the position was filled temporarily by an individual who appellants admit was not qualified for the job, and later the position was filled by an individual of complainant's qualifications. *See Davis v. Weidner*, 596 F.2d at 730.

Defendants-appellants then met their burden of rebutting appellees' prima facie case,[7] by articulating a legitimate, nondiscriminatory reason for appellee's discharge.[8] Appellants' only articulated reason was that appellee was discharged for "Conduct Unbecoming a State Employee, in that while [he was] *claiming to be ill* after surgery *and unable to perform [his] duties* as a Dietician III for the State of Indiana and this Training Center, [he] worked as a consulting dietician for the Glen Oaks Nursing

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[5]The district court found that "[t]here was absolutely no evidence to indicate that plaintiff was not qualified for his position as chief dietician...."

[6]A showing of satisfactory performance is necessary to raise an inference of discrimination in a discharge from employment. Plaintiff met this requirement by showing that employer accepted his work without express reservation. *Flowers v. Crouch-Walker*, 552 F.2d 1277, 1281-1283 (7th Cir. 1977). Plaintiff contends that he experienced no problems in his employment until the defendant, Dr. Ackerman, was appointed as superintendent of the hospital. Upon said appointment, plaintiff contends he became a victim of a pattern of discrimination by the defendant; as an example it is alleged that Dr. Ackerman had previously held a hearing without giving plaintiff notice or the right to have an attorney and demoted plaintiff, appointing a lesser qualified white person to plaintiff's job.

[7]"The defendant[s] need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant[s'] evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 254-255 (citations omitted); *see* note 9, *infra*.

[8]"A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of facts on the issue of whether the defendant's explanation is pretextual." *Id.* at 255 n.10; *see* note 2, *supra*.

Home in Auburn, Indiana on the following dates [five specified dates]." (Plaintiff's *Exhibit* 1—State Hospital's official notice of suspension pending dismissal) (emphasis added). The record is devoid of any facts in support of the dissent's view that appellants' articulated reason was based on a claim of a state policy forbidding an employee from engaging in any other kind of employment while on sick leave. The dissent ignores that appellants' articulated reason merely sought to utilize appellee's performance of consulting work as proof of the lack of truth and veracity in appellee's claim to be ill and unable to perform his duties at the State Hospital. (*Transcript* at 119-20, 131).

Direct showing of the discriminatory reasons that more likely motivated an employer in the decision to discharge an employee is not the only method of proving intentional discrimination. Intentional discrimination may also be proven "indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 256; *McDonnell Douglas v. Green*, 411 U.S. at 806-807. We hold that the evidence establishes that the appellee proved that appellants' proffered reason was not the true reason for his discharge and that he was the victim of intentional discrimination. The primary facts proved at the trial were that while plaintiff was working at the State Hospital, before he went on sick leave, he was informed by a State Hospital social worker that there was a need at the Glen Oaks Nursing home for a consulting dietician in order for the nursing home to meet medical standards. Because the State Hospital housed some forty patients at the nursing home, there was some concern that the home might be forced to close if medicare standards were not met and that the State Hospital would then be required to find alternative housing for the patients. Following the lead provided by the social worker at the State Hospital and pursuing the need recognized by the social worker, plaintiff agreed, prior to going on sick leave, to serve as a

consultant to the nursing home. This was not shown to be contrary to law or State Hospital policy. On April 16, 1974, plaintiff began an extended period of sick leave. Dr. Reed notified the State Hospital that plaintiff would be entering Parkview Hospital, but that it was not possible at that time to determine how long plaintiff would be unable to work. On April 24, plaintiff underwent an especially complicated hemorrhoidectomy surgery. On June 7, Dr. Towles notified the State Hospital by letter that plaintiff would not be able to return to work until approximately July 8. On July 1, Dr. Towles again saw plaintiff and found that plaintiff was still having difficulty from the surgery. Dr. Towles so informed the State Hospital by a letter dated July 3, which also requested a leave of absence until July 29. Dr. Towles closed the letter by stating that "if additional information is needed please do not hestitate to call this office."

The facts further prove that when plaintiff discussed returning to his job at the State Hospital, Dr. Towles "objected violently," since plaintiff's post-surgery restrictions included sitting and lifting and plaintiff's duties at the State Hospital required a great deal of sitting and some occasional lifting. Most importantly, State Hospital policies required that a person returning from sick leave return with no restrictions. Thus, plaintiff was still unable to return to the State Hospital because he could not do so free of the restrictions placed on him by the attending surgeon. However, plaintiff's restrictions did not preclude him from engaging in part-time consulting work at the nursing home. His work there required neither sitting nor lifting. Further, plaintiff intended to make only approximately five consulting trips during the four-month period of his convalescence. Dr. Towles expressly approved plaintiff's limited number of consulting trips on the condition that plaintiff follow specified precautions, but he did not approve plaintiff's return to work at the State Hospital because of the difference in job requirements between the nursing home and State Hospital.

Dr. Ackerman, a doctor of education who is Superintendent of the State Hospital, learned of plaintiff's consulting work at the nursing home. Dr. Ackerman made a visit to the nursing home to see State Hospital patients and to personally investigate whether plaintiff was consulting there. However, Dr. Ackerman did not inquire as to the nature or extent of plaintiff's duties at the nursing home, nor did he inquire of plaintiff or of Dr. Towles as the plaintiff's duties or whether plaintiff had his doctor's permission to perform the consulting duties. The district court found that this latter course of conduct by Dr. Ackerman was in stark contrast to his personal investigation at the nursing home to verify that plaintiff had done some part-time consulting there.

Although Dr. Ackerman would not have allowed plaintiff to return to work until plaintiff could perform his full duties at the State Hospital, Dr. Ackerman determined that plaintiff's engaging in part-time consulting work while drawing sick pay from the State of Indiana constituted "conduct unbecoming a state employee," and terminated plaintiff's employment at the State Hospital, despite the fact that the part-time work was undertaken to meet the Hospital's need as recognized by its social worker. Dr. Ackerman did not discuss the termination with the plaintiff nor with Dr. Towles before suspending plaintiff effective July 16, pending termination as of August 15, even though Dr. Towles had invited such inquiry.

The following evidence was proved, establishing that defendants' proffered reason for discharging plaintiff was a pretext: On July 11, Dr. Towles spoke to Dr. Sirlin, Medical Director of the State Hospital in 1974, and told Dr. Sirlin that he thought plaintiff would be able to return to work shortly and that Dr. Towles would communicate with Dr. Sirlin after again examining plaintiff. However, the decision to dismiss plaintiff was made on or before July 16, 1974, before Dr. Towles could report to Dr. Sirlin. Even though defendants were expecting a further report from

plaintiff's surgeon, plaintiff was suspended pending dismissal before that report could be sent. The action was taken prior to any investigation of whether plaintiff had the consent of his surgeon to continue doing permissible part-time work at the nursing home, work he had agreed to do, upon arrangement by the Hospital's social worker, prior to his sick leave, and the decision to suspend plaintiff was taken prior to any investigation as to whether the nature of plaintiff's work at the nursing home differed significantly from the nature of his work at the State Hospital. After plaintiff's suspension and pending dismissal, Dr. Sirlin received a strongly worded letter from Dr. Towles, dated July 19, protesting plaintiff's dismissal and expressing surprise and indignation at defendants' apparent disregard for his recommendations. Dr. Towles' letter discussed the post-surgical complications still being experienced by plaintiff and expressly stated that he had given plaintiff permission to make five or six trips to the Glen Oaks Nursing Home in Auburn, Indiana. Dr. Towles stated in the letter that "because he had made these trips, did not qualify him for a return to his usual occupation, and this I shall maintain." Dr. Towles concluded his letter to Dr. Sirlin by stating that "I was very surprised at your course of action since I had talked with you, given you his true state of affairs, and had informed you I would contact you after I had seen him. I must assume that you consider me either incompetent or lying, or both. Would be most happy to talk to you over the telephone or give you additional information by letter."

Only after receiving Dr. Towles' strongly worded letter did Dr. Sirlin call Dr. Towles on July 22. What the district court found as most probative of the fact that appellants' proffered reason was a pretext, was a memorandum prepared by Dr. Sirlin to Dr. Ackerman which purports to convey the July 22 conversation between Doctors Towles and Sirlin, but which in no way accurately reflects the conversation. Dr. Sirlin's memo stated that Dr. Towles

"feels he has been misled by [appellee]". However, the district court found that Dr. Towles' July 19 letter to Dr. Sirlin and Dr. Towles' court testimony thoroughly discredit this conclusion, which was the superior's basis for appellants' articulated reason for discharging appellee. Appellants' records and the court testimony indicate appellants' fabrication of the facts and the utter disregard of information at their disposal relevant to appellee's conduct.[9]

In summary, the appellants' articulated reason of "conduct unbecoming a state employee" was a conclusory reason which might have been a legitimate reason for discharging the appellee if he had not been able to prove employer's intentional discrimination by showing that the articulated reason was a mere pretext.

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[9]The dissent mischaracterizes these findings as the majority's "credibility determination", and proceeds to make its own findings as to credibility. However the credibility determinations were made by the district court in its province of judging the credibility of the evidence and determining the facts. Unlike the dissent, we do think it was proper for the district court to consider whether actions which have occurred subsequent to the appellants' determination to discharge the appellee were probative of the actual motives for appellants' determination. On review we do not find the credibility determinations and the findings of fact clearly erroneous.

III

For the foregoing reasons, the district court's order[10] is affirmed.[11]

PELL, *Circuit Judge*, dissenting. In this case, the majority opinion upholds a judgment to the effect that the state authorities had discriminatorily discharged the plaintiff in violation of Title VII. This means in this case, in the words of the majority opinion, that the record established that the employer had treated the plaintiff less favorably than others because of his race. The plain and simple fact is that the plaintiff was engaging in part-time consulting work for pay while drawing sick pay from the public treasury and this was the reason Dr. Ackerman articulated for the

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[10]The district court held that "defendants did not meet their burden of establishing sufficient non-discriminatory reasons for terminating plaintiff's employment," but the court continued its analysis and held that "[i]t can only be concluded from the evidence in this case that defendants' stated reason for the termination of plaintiff's employment was pretext."

We hold that the district court's initial holding that defendants did not establish sufficient non-discriminatory reasons for terminating plaintiff's employment was non-reversible error. We believe that defendants met their burden of articulating a legitimate reason for plaintiff's discharge in that the articulated reason was sufficient to raise a genuine issue of fact as to whether defendants discriminated against the plaintiff, and it sufficiently met plaintiff's prima facie case, while framing the factual issue with sufficient clarity so that plaintiff was required to demonstrate pretext. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 254, 255, 256. Nevertheless, the error is not grounds for reversal in this case, because our independent examination of the ultimate fact of discrimination leads us to agree with the district court's finding that the plaintiff had met the burden of showing that defendant's articulated reason was a pretext.

[11]Appellee seeks attorney's fees for the defense of this appeal. However appellee does not present any information to substantiate the request. Appellee is directed to file with the district court, within thirty days, a complete breakdown of the requested fees and such other material supporting the request, within the guidelines set forth in *Water v. Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976). The district court shall determine the required procedure and issue an order disposing of the claim.

discharge, i.e., that this was conduct unbecoming a state employee.

I can think of no way of characterizing the being on the public payroll because of sick leave while not working but nevertheless performing compensated work in the private sector other than that of "unbecoming conduct." It takes no hyperactive imagination to realize what an embarrassing position the hiring authorities would have been placed in if this had come to the attention of the media. It appears to me that the appearance of unbecoming conduct on the part of a public employee is almost as damaging to the image of good government as would be the actual fact of misconduct.

I regard it as immaterial that the type of work at the nursing home may have been of a less demanding nature than the employment at the state hospital. The state may have had no policy against "moonlighting;" I cannot tell from the record. It certainly, in any event, is an entirely different situation than the present one if a public employee has the capability of performing a second job and is being paid for both. Here he was not performing a second job but only a first job although being paid by the public while not working for it.

I fail to follow the logic of the majority opinion in its holding that the discharge was pretextual. The record is silent as to any discriminatory practices on the part of the appellants toward any employees because of race, color, religion, sex, or national origin. The finding of pretext dangles on the weak thread of the plaintiff's not being well enough to return to his state job and contradictory testimony as to what one doctor said to another. Apparently, the majority makes the credibility determination as to the accurate reflection of this conversation. Elsewhere, however, in the majority opinion it is clear that the memorandum from Dr. Sirlin to Dr. Ackerman was subsequent to the determination already made, and properly so, that the discharge was justified by conduct

unbecoming to a state employee. I see nothing conclusory or pretextual about guarding the public coffers from unwarranted criticism.

In short, the majority's syllogism seems to be that plaintiff was a member of a protected minority class, that he was a competent employee with acceptable qualifications, that he was discharged because he was working on another job while on sick leave, *ergo*, the reason given for his discharge was pretextual. The process ignores the fact that there was a legitimate nondiscriminatory reason for the discharge. What Title VII is all about is to put a stop to discriminatory treatment of employees. The essential element of discrimination is missing here.

The plaintiff may well have been well qualified and when he was on the job he may have been an effective employee. The ultimate fact is that state authorities are branded as having engaged in discriminatory conduct in violation of a federal statute, notwithstanding, as the majority opinion observed, "the appellants did in fact seek 'minority' applicants."

This record does not justify that stigma. The appellants did what public officials properly should have under the circumstances here involved.

With all due respect to the majority opinion, and to the then district court judge, I would reverse with direction to enter judgment for the defendants. For the reasons stated above, I respectfully dissent.*

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*I note the comments in the majority opinion regarding my dissent. Of course, the seeking of minority applicants will not preclude the existence of discriminatory treatment of a single individual. It is, however, a significant factor in a record which is devoid of evidence of racial discrimination. I do not regard a questionable finding that a post hoc exchange of correspondence really was only verisimilar on the part of Dr. Ackerman as a sufficient basis for saying that the discharge resulted from racial discrimination. An employer accused unjustly of discrimination unfortunately may tend to resort to unnecessary rationalization. This is an infirm basis for saying that there was indeed discrimination.

A true Copy:
Teste:

_____
Clerk of the United States
Court of Appeals for the
Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

HAROLD deLESSTINE,	)	
	)	
Plaintiff,	)	
	)	
V.	)	CIVIL NO. F 78-93
	)	
FORT WAYNE STATE HOSPITAL AND TRAINING CENTER, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF DECISION AND JUDGMENT ORDER

Plaintiff brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., alleging that defendants unlawfully terminated plaintiff's employment as a dietitian III at the Fort Wayne State Hospital and Training Center because of plaintiff's race.

Plaintiff, a black citizen, filed this employment discrimination action on July 25, 1978. He had previously filed charges with the EEOC. Plaintiff received a notice of right to sue letter from the EEOC and thereafter filed suit in this court.

In order to establish a prima facie case against the defendants, it was plaintiff's burden to show (1) that he belongs to a protected class; (2) that he was qualified for the position from which he was terminated; (3) that despite his qualifications, his employment was terminated; and (4) that after his termination, the job was filled by someone of the same qualifications as plaintiff but not by a member of the protected class. *Davis v. Weidner*, 596 F.2d 726 (7th Cir.

19769); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973); *Flowers v. Crouch-Walker*, 552 F.2d 1277 (7th Cir. 1977).

Plaintiff is a member of a protected class. Plaintiff was trained in dietetics, having received a bachelor of science degree from New York University and a master of science degree from Columbia University. There was absolutely no evidence to indicate that plaintiff was not qualified for his position as chief dietitian at the Fort Wayne State Hospital and Training Center (State Hospital).

Plaintiff was initially employed by the State Hospital in 1963 and was discharged on August 15, 1974 from his employment as chief dietitian at the State Hospital for "conduct unbecoming a state employee." After plaintiff's employment was terminated, plaintiff's position was filled temporarily by one Mr. Coffey, a white male who had been one of plaintiff's subordinates. Dr. Ora Ackerman, the superintendent of the State Hospital admitted that Coffey was not qualified for the job. Plaintiff's permanent replacement was Effie Goodwin Lee, a while female.

Thus, plaintiff met his burden of establishing a prima facie case of racial discrimination in employment. The burden then shifted to defendants to show sufficient nondiscriminatory reasons for terminating plaintiff's employment.

Plaintiff had been employed as a dietitian III at the State Hospital since 1963. As a dietitian III, plaintiff was in charge of the entire food service employees, supervised cleaning and cooking, dealth with budgetary matters concerning the food service operation, and from time to time filled in for absent employees of the food service operation as his work required. Plaintiff's usual duties required a great deal of desk work and sitting. When filling in for absent employees, it was sometimes necessary for plaintiff to prepare food, work on sanitation, or drive a truck to distribute food to service locations within the

hospital complex. While such manual labor was not part of plaintiff's formal job description, plaintiff occasionally engaged in such work in order the keep the operation running smoothly.

Plaintiff's job evaluations ranged from "needs improvement" on certain aspects of his work on two occasions to "highly satisfactory" and "above average" on several occasions. Plaintiff's performance was most often rated as "average" or "meets requirements."

Plaintiff also did some part-time consulting work at the Glen Oaks Nursing Home in Auburn, Indiana. In 1974, before plaintiff's surgery and while plaintiff was working at the State Hospital, plaintiff was informed by a State Hospital social worker, Janice Baker, that there was a need at the nursing home for a consulting dietitian in order for the nursing home to meet medicaid standards. Because the State Hospital housed some forty patients at the nursing home, there was some concern that the home might be forced to close if medicaid standards were not met and that the State Hospital would then be required to find alternative housing for the patients.

Following the lead provided by the social worker at the State Hospital and pursuing the need recognized by the social worker, plaintiff established a consulting relationship with the nursing home. Plaintiff worked at the nursing home two days per month for a total of approximately sixteen hours per month. During the period of time relevant here, plaintiff worked on the following dates:

May 28, 1974, from 8:30 a.m. to 4:30 p.m.
May 31, 1974, from 6:50 a.m. to 3:00 p.m.
June 26, 1974, from 6:45 a.m. to 3:00 p.m.
June 27, 1974, from 8:45 a.m. to 5:00 p.m.
July 11, 1974, from 9:00 a.m. to 5:00 p.m.

Plaintiff was not an employee of the nursing home but acted as a paid consultant. Plaintiff advised the nursing

home's dietary supervisor but did not supervise the day-to-day food service program as he did at the State Hospital. Plaintiff also evaluated the nursing home's menus, checked patients' charts, and inspected the nursing home for compliance with sanitary standards. Plaintiff's work at the nursing home did not require any manual labor and required little or no sitting.

Plaintiff began an extended period of sick leave on April 16, 1974. On April 24, 1974, plaintiff underwent surgery, a hemorrhoidectomy. Plaintiff's surgery was especially complicated because he "waited so long" to have the operation. He had been informed a year in advance that he "badly needed the operation." Dr. Jeff H. Towles, plaintiff's board certified surgeon, testified that while most patients require a recovery period of six to eight weeks, plaintiff needed a significantly longer recovery period because he had postponed surgery for so long. Plaintiff developed several complications due to the surgery and postponement.

Dr. John D. Reed notified the State Hospital that plaintiff would be entering Parkview Hospital on April 16, 1974 and that it was not possible at that time to determine how long plaintiff would be unable to work.

On June 7, 1974, Dr. Towles notified the State Hospital by a letter that plaintiff "was checked in the Office and is doing fairly well but is still having some difficulty." Dr. Towles added that plaintiff would not be able to return to work until approximately July 8, 1974. On July 1, 1974, Dr. Towles again saw plaintiff and found that plaintiff was "still having quite a bit of difficulty from his surgery." Dr. Towles so informed the State Hospital by a letter dated July 3, 1974 which also requested a leave of absence until July 29, 1974. Dr. Towles closed the letter saying, "If additional information is needed please do not hesitate to call this office."

Plaintiff discussed returning to his job at the State Hospital with Dr. Towles. Dr. Towles "objected violently."

Plaintiff's post-surgery restrictions included sitting and lifting; plaintiff's duties at the State Hospital required a great deal of sitting and some occasional lifting. State Hospital policies required that a person returing from sick leave return with no restrictions. Thus, plaintiff was still unable to return to the State Hospital, because he could not do so free of the restrictions placed on him by the attending surgeon.

Plaintiff's restrictions did not, however, preclude him from engaging in his part-time consulting work at the nursing home. His work there required neither sitting nor lifting. Further, plaintiff intended to make only approximately five consulting trips during the four-month period of his convalescence. The trips had been discussed with Dr. Towles, who approved them on the condition that plaintiff follow certain precautions outlined by Dr. Towles. Dr. Towles expressly approved plaintiff's limited number of consulting trips but did not approve plaintiff's return to work at the State Hospital because of the difference in job requirements between the nursing home and State Hospital. The plaintiff had discussed with Dr. Towles in some detail both his duties and responsibilities at the State Hospital and those incident to his part-time consulting work.

Dr. Ora Ackerman, Superintendent of the State Hospital from June 1, 1966 to the present, learned of plaintiff's consulting work at the nursing home by a report from a staff member at the State Hospital. Ackerman made a visit to the nursing home to see State Hospital patients and to personally investigate whether plaintiff was consulting there. However, Dr. Ackerman did not inquire as to the nature of extend of plaintiff's duties at the nursing home, nor did he inquire of plaintiff or of Dr. Towles as to plaintiff's duties or whether plaintiff had his doctor's permission to perform the consulting duties. Dr. Ackerman never talked to Dr. Towles; he did not ask Dr. Towles about plaintiff's condition or about his various

duties at the State Hospital and nursing home. This course of conduct was in stark contrast to his personal investigation at the nursing home to verify that plaintiff had done some part-time consulting there. Although Dr. Ackerman would not have allowed plaintiff to return to work until plaintiff could perform his duties at the State Hospital, Dr. Ackerman determined that plaintiff's engaging in part-time consulting work while drawing sick pay from the State of Indiana constituted "conduct unbecoming a state employee" and terminated plaintiff's employment at the State Hospital. Dr. Ackerman did not discuss the termination with plaintiff or with Dr. Towles before suspending plaintiff effective July 16, 1974 pending termination as of August 15, 1974 even though Dr. Towles had invited such inquiry.

The only reason for plaintiff's termination was given in the discharge in the following words:

> This suspension pending dismissal is for Conduct Unbecoming a State Employee, in that while you were claiming to be ill after surgery and unable to perform your duties as a Dietician III for the State of Indiana and this Training Center, you worked as a Consulting Dietician for the Glenn Oaks Nursing Home in Auburn, Indiana on [certain dates]....

On July 11, 1974, Dr. Towles spoke to Dr. Sirlin, medical director of the State Hospital in 1974, and told Dr. Sirlin that he thought plaintiff would be able to return to work shortly and that Dr. Towles would communicate with Dr. Sirlin after again examining plaintiff. However, the decision to dismiss plaintiff was made on or before July 16, 1975, before Dr. Towles could report to Dr. Sirlin. Even though defendants were expecting a further report from plaintiff's surgeon, plaintiff was suspended pending dismissal before that report could be sent. The action was taken prior to any investigation of whether plaintiff had the permission of his surgeon to do part-time work and prior to any investigation as to whether the nature of plaintiff's

work at the nursing home significantly differed from the nature of his work at the State Hospital. Only on July 22, 1974, after plaintiff's suspension pending dismissal and after receiving a strongly worded letter from Dr. Towles protesting plaintiff's dismissal and expressing surprise and indignation at defendants' apparent disregard for his recommendations concerning plaintiff, did Dr. Sirlin again communicate with Dr. Towles. Dr. Towles' letter also discussed the post-surgical complications still being experienced by plaintiff and expressly stated that he had given plaintiff permission to make five or six trips away from Fort Wayne, Indiana, to Auburn, Indiana. Dr. Towles stated in the letter, "because he made these trips, did not qualify him for a return to his usual occupation, and this I shall maintain." Dr. Towles offered to discuss the matter with Dr. Sirlin or to provide additional information by letter.

After receiving Dr. Towles' angry letter, Dr. Sirlin called Dr. Towles on the telephone on July 22, 1974 and spoke with him. Dr. Sirlin learned that Dr. Towles had given plaintiff permission to go to Auburn, Indiana, on four or five occasions "to inspect a few nursing homes. . . ." After the telephone conversation, Dr. Sirlin prepared a memorandum to Dr. Ackerman, purportedly based on that conversation, but which did not accurately reflect the conversation between Dr. Sirlin and Dr. Towles. In Dr. Sirlin's July 22, 1974 memorandum to Dr. Ackerman, Dr. Sirlin concluded, "Dr. Towles feels he could not condone Mr. deLesstines [sic] working eight hours a day. He feels he has been misled by Mr. deLesstine." These conclusions were thoroughly discredited by Dr. Towles in his testimony at trial. Dr. Towles testified that plaintiff had specifically asked about going out of town to provide a dietary consulting service. Dr. Towles gave plaintiff permission to do the consulting work if it did not involve sitting, but would not allow plaintiff to resume his work at the State Hospital because it entailed prolonged sitting. Dr. Towles

testified that he was never asked by anyone from the State Hospital whether plaintiff was able to do consulting work or work other than that at the State Hospital. Because of the circumstances surrounding plaintiff's termination, Dr. Towles felt "obligated" to tell the State Hospital what plaintiff told him and what he told plaintiff. It was Dr. Towles' recollection that he talked to State Hospital personnel about plaintiff's consulting work. Dr. Towles testified that plaintiff had fully informed him about the consulting work and that plaintiff did not mislead him in any way.

Thus, defendants did not meet their burden of establishing sufficient nondiscriminatory reasons for terminating plaintiff's employment. In spite of the fact that plaintiff's surgeon consistently stated that plaintiff was unable to return to his work at the State Hospital, Dr. Ora Ackerman, a doctor of education, not a medical director, determined without the benefit of an interview with plaintiff or plaintiff's surgeon that if plaintiff could work part time at the nursing home, he could work part time at the State Hospital. Yet Dr. Ackerman would not have allowed plaintiff to return to work in either a full-time or part-time capacity unless plaintiff returned with no restrictions. At the time plaintiff was suspended pending termination, he could not have returned to work without restrictions. Thus, Dr. Ackerman discharged plaintiff for not returning to work while at the same time placing conditions on plaintiff's return that he knew plaintiff could not fulfill, i.e, that plaintiff return to work with no restrictions. Dr. Ackerman had been placed on notice that plaintiff's post-surgery recovery had not advanced sufficiently to allow plaintiff to return to his work at the State Hospital without restrictions.

Dr. Ackerman made no attempt to compare plaintiff's duties at the State Hospital with plaintiff's duties at the nursing home. He made absolutely no attempt to determine whether plaintiff might be capable of working at the

nursing home but not capable of performing his duties at the State Hospital. With no factual basis for his decision regarding plaintiff's physical ability to return to work at the State Hospital and with no inquiry, and dismissing the recommendation of plaintiff's doctor, defendant Ackerman determined that plaintiff was capable of returning to work at the State Hospital and dismissed plaintiff for conduct unbecoming a state employee.

It can only be concluded from the evidence in this case that defendant's stated reason for the termination of plaintiff's employment was pretext.

Plaintiff's damages in this action were calculated by determining the differences between the amount of income plaintiff earned in the years 1975 through 1979 and July 15, 1974 through December 31, 1974 and the income plaintiff would have received during those periods of time had he been retained in his position as chief dietitian at the State Hospital. The parties stipulated at trial and by a trial exhibit that that difference was $30,007.76. Plaintiff does not seek reinstatement to his former position at the State Hospital.

Plaintiff also seeks costs and attorney's fees in this action. Section 2000e-5(k) of Title 42 of the United States Code provides that in any Title VII proceeding, the court may allow the prevailing party a reasonable attorney's fee as part of the costs. The court finds that costs and attorney's fees should be assessed against defendants in this action. The considerations relevant to computing a reasonable attorney's fee award have been set forth by the United States Court of Appeals for the Seventh Circuit in *Waters v. Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976). The time spent by the attorney is not to be simply multiplied by a billing rate. The primary factors in the computation include not only the time reasonably spent on the case, but also the value of the attorney's work, given local legal fees, and his abilities,

reputation and degree of success in the case. Also relevant is whether the attorney's efforts in this case precluded him from working on other legal matters. These factors are drawn from the sections of the Code of Professional Responsibility that describe how an attorney should determine the fee he may properly charge a client.

While plaintiff's request for an award of costs and attorney's fees will be granted, the court cannot at this time, on the showing before it, compute the proper amount of such an award. Plaintiff will therefore be directed to file a complete breakdown of charges and time and such other material supporting the request for attorney's fees for this case only as is required by *Waters v. Wisconsin Steel Works, supra*. The amount of such an award will be set by further order of the court. A copy of plaintiff's showing relating to attorney's fees shall be served on defendants, and defendants shall have ten (10) days from the date of filing to respond to otherwise challenge the showings and fees set forth.

This memorandum of decision contains the court's findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

JUDGMENT ORDER

It is therefore considered, ordered and adjudged that the plaintiff, Harold deLesstine, recover of and from the defendants, Fort Wayne State Hospital Training Center and Ora Ackerman, damages in the amount of $30,007.76.

It is further ordered that plaintiff recover of and from the defendants, Fort Wayne State Hospital and Training Center and Ora Ackerman, attorney's fees in an amount to be set by further order of the court. Plaintiff is directed to file a complete statement of charges and an affidavit of counsel in support of his request for attorney's fees in a manner inconsistent with that set out in *Waters v. Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976). A copy of plaintiff's showing relating to attorney's fees shall be served on defendants, and defendants shall have ten (10) days from the date of filing to respond or otherwise challenge the showings and fees set forth.

Entered this *23rd* day of July, 1980.

Jesse Eschback

United States District Judge

§2000e-2 Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Employment agency practices

(b) It shall be unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Labor organization practices

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from his membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or to classify or fail or refuse to refer for employment

any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Training programs

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Business or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

(e) Notwithstanding any other provision of this subchapter (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the

normal operation of that particular business or enterprise, and (2) it shall not be unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such, school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Members of Communist Party or Communist-action or Communist-front organizations

(f) As used in this subchapter, the phase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to any individual who is a member of the Communist Party of the United States or any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

National Security

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ an individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall be an unlawful employment practice for an employer to apply different standards of compensation, of different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Businesses or enterprises extending preferential treatment to Indians

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Preferential treatment not be granted on account of existing number of percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub.L. 88-352, Title VII, §703, July 2, 1964, 78 Stat, 255; Pub.L. 92-261, §8(a), (b), Mar. 24, 1972, 86 Stat. 109.

Office - Supreme Court, U.S.
FILED
OCT 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-518

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ORA ACKERMAN, as Superintendent;
FORT WAYNE STATE HOSPITAL AND TRAINING
CENTER, an Instrumentality of the
State of Indiana
Petitioners,

v.

HAROLD DELESSTINE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether or not replacing a discharged black male with a white female serves as a complete defense to a charge of racial discrimination pursuant to 42 U.S.C. §2000-e by depriving the discharged party of the right to make a *prima facie* case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

2. Whether or not a party may seek a writ of certiorari to challenge the credibility determinations and fact findings of the District Court, as affirmed by a Court of Appeals, without any allegation of legal error.

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SUMMARY OF ARGUMENT

The "facts" which the Petitioners seek to use as a basis for review are not found in the opinions of the courts below. Rather than relying upon the facts as found by the District Court, and affirmed by the Seventh Circuit Court of Appeals, Petitioners base their request for issuance of a writ of certiorari on testimony which was not found as fact by the lower courts.

Petitioners' legal argument is that replacing a discharged black male with a white female destroys a *prima facie* case of racial discrimination, thus preventing any claim of racial discrimination. Respondent contends that this argument is totally unsupported by any citation to any legal authority whatsoever and is totally inconsistent with the history and purpose of Title VII of the 1964 Civil Rights Act.

Respondent also argues that Petitioners' allegation that their defenses were "ignored" by the Seventh Circuit Court of Appeals is nothing more than an attempt to relitigate facts that were found against them at both the District Court and the Seventh Circuit Court of Appeals. Such an attempt to re-argue the facts is not a proper ground for issuance of a writ of certiorari.

ARGUMENT

I.

THE "FACTS" RECITED BY PETITIONERS ARE NEITHER THOSE FOUND BY THE DISTRICT COURT NOR THOSE AFFIRMED BY THE SEVENTH CIRCUIT COURT OF APPEALS

A great difference emerges between what the District Court actually found as facts and that which the Petitioners would have this Court believe. Apparently, Petitioners attempt to highlight the testimony most favorable to their position rather than focusing upon any allegation of legal error based upon the facts as found by the District Court. Each appellate court must apply the "clearly erroneous" standard to the findings of the District Court under *Fed. R. Civ. P.* 52(a). *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 365 U.S. 100 (1969).

The facts as found by the District Court are contained at (A 16-26) of the Petition for Certiorari. The Seventh Circuit Court of Appeals discussion of the facts is found at (A 5-11).

A number of examples of Petitioners' purported "facts" are sufficient to make the point. Petitioners suggest that Respondent was physically able to return to work, the fact is he was not (A-23); Petitioners suggest Respondent could have worked, the fact is Dr. Ackerman imposed conditions upon Respondent's return which Dr. Ackerman knew could not be fulfilled (A-23). The fact is Respondent's surgeon explained the consulting employment to Petitioners (A-23) and invited inquiry from the Petitioners (A-22) which Petitioners totally ignored.

At page 3 of their Petition, Petitioners contend that a July 16, 1974, telephone conversation between Dr. Sirlin and Dr. Towles resulted in Dr. Sirlin recalling "a negative response from respondent's physician concerning permission to work, a position which Dr. Sirlin

indicated to Petitioner Ackerman by written report". The District Court found (A 22-23) that Dr. Sirlin's "recollection" was thoroughly discredited by Dr. Towles to the point where the Court of Appeals felt compelled to indicate that Dr. Sirlin's testimony amounted to a "fabrication of the facts" (A-11).

As a result of its findings, the District Court found that respondent, by virtue of his race, belonged to a protected class, was qualified for the position from which he was terminated, that despite his qualifications he was terminated, and that after his termination his position was filled by a white male on an interim basis, and then by a white female on a permanent basis. The District Court concluded from the foregoing facts that respondent had proven a case of discrimination. A divided Seventh Circuit Court of Appeals affirmed these findings.

II.

PETITIONERS HAVE NOT SHOWN THE SEVENTH CIRCUIT COURT OF APPEALS' OPINION TO BE IN CONFLICT WITH ANY DECISION OF THIS COURT

Petitioners suggest that Supreme Court Rules 17.1 (b)[1] and (c) serve as the jurisdictional basis for this Court's review. As a result, it is incumbent upon them to show a conflict with applicable decisions of this Court. Petitioners have not done so for the simple reason that no court of this country at any level has ever upheld the basic proposition which petitioners argue; that proposition being the replacement of a black male with a white female serves as a complete defense[2] to a charge of *racial* discrimination. This proposition seems so completely at odds with any understanding of Title VII of the 1964 Civil Rights Act[3] that the Seventh Circuit Court of Appeals was moved to brand it "nonsensical". (A-5,n.4)

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[1]Since this case originated in The United States District Court for the Northern District of Indiana, Fort Wayne, Division, Respondent is at a loss to see how Rule 17.1 (b) gives this court jurisdiction.

[2]By denying a plaintiff the opportunity to make a *prima facie* case, thus foreclosing any review of the employer's reason for the discharge.

[3]42 U.S.C. §2000-e *et. seq.*

Petitioners' so-called "standard" test of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) is anything but "standard", as this Court noted in the *McDonnell Douglas* decision 411 U.S. at 802 n. 13. The *McDonnell Douglas* test shifts and adapts depending upon the type of case involved. *McDonnell Douglas* was a failure to hire case. This case calls for a slightly different standard. The accepted standard in a racially motivated discriminatory discharge case was enunciated by the Seventh Circuit Court of Appeals in the case of *Flowers v. Crouch-Walker*, 552 F. 2d 1277 (7th Cir. 1977), when it held that the appropriate *prima facie* test for a case of racially discriminatory discharge was:

> 1. That the plaintiff was a member of a racial minority.
>
> 2. That he was qualified for the job which he was performing;
>
> 3. That he was satisfying the normal requirements in his work;
>
> 4. That he was discharged; and
>
> 5. That after his discharge the employer assigned *white* employees to do the same work. (552 F. 2d at 1282) *(Emphasis added)*.

The *Flowers*, *supra*, test has gained wide acceptance in the courts of this country, and has not been repudiated.

A review of the facts shows that each of the prerequisites for a *prima facie* case of racially discriminatory discharge was present in this case. The total absence of any case authority at any level across the nation supporting the Petitioners' legal theory means that the Petitioners have not shown that the Seventh Circuit's opinion was in conflict with any decision of any court, let alone any decision of this Court.

Petitioners' argument is repugnant to the concept of racial equality and harmony. The Petitioners' suggestion that employment of a white woman necessarily

precludes racial animus is contradicted by centuries of history. If the Petitioners suggest that such employment does not preclude racial animus, but rather only immunizes it from redress by the aggrieved Respondent, then Petitioners plunge racial minorities into an antebellum lack of rights, self-esteem, and social mobility.

III.

THE DISTRICT COURT AND THE SEVENTH CIRCUIT COURT OF APPEALS CLEARLY REJECTED PETITIONERS' REASON FOR DISCHARGING RESPONDENT AS A PRETEXT

Petitioners claim that their defense was "ignored" by the Seventh Circuit. On the contrary, the Seventh Circuit spent nearly three full pages (A-9, 10, & 11) thoroughly analyzing Petitioners' alleged "nondiscriminatory" reason and rejected the same as being an obvious pretext. The Seventh Circuit Court of Appeals labeled the proof and testimony of the petitioners on this issue as "appellants' fabrication of the facts and the utter disregard of information at their disposal relevant to appellee's conduct" (A-11).

Petitioners simply seek to have this Court re-weigh the evidence with regard to the validity of their defense. This is something the Court may not do.

Petitioners protest that the numerical analysis of their work force was ignored. This Court has held any number of times that a racially balanced work force does not serve as a complete defense to a charge of race discrimination. See, *Furnco Const. Corp. v. Waters*, 438 U.S. U.S. 562 (1978); *Teamsters v. United States*, 431 U.S. 324 (1977). Earlier this year, this Court held that neutral or nondiscriminatory statistics do not establish a complete defense even when a claim is one under the *Griggs*[4] disparate impact theory. *Connecticut v. Teal*, - U.S. - 73 L. Ed. 2d 130 (1982). Petitioners'

[4] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)

defenses were given a thorough review by both the District Court and the Court of Appeals and found to be wanting on the facts of this case.

IV.

CONCLUSION

The only legal argument Petitioners make is the assertion, without citation of authority, that replacing a black male with a white female destroys a *prima facie* case of *racial* discrimination. Other arguments made by Petitioners simply beg for the Court to re-weigh the evidence, not based upon the facts found by the District Court and affirmed by the Seventh Circuit Court of Appeals, but rather from testimony which Petitioners apparently wish the lower courts had found as fact.

Petitioners' novel assertion of legal error is so completely contrary to a reasonable interpretation of Title VII the 1964 Civil Rights Act as to give this Court no reason to grant certiorari. This Court should clearly not grant certiorari for the rest of Petitioners' asserted "errors" since they are clearly nothing more than an attempt to relitigate facts already decided against them.

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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